HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND EDELMAN JJ

M185/2016

ESSO AUSTRALIA PTY LTD APPELLANT

AND

THE AUSTRALIAN WORKERS' UNION RESPONDENT

M187/2016

THE AUSTRALIAN WORKERS' UNION APPELLANT

AND

ESSO AUSTRALIA PTY LTD RESPONDENT

Esso Australia Pty Ltd v The Australian Workers' Union
The Australian Workers' Union v Esso Australia Pty Ltd
[2017] HCA 54
6 December 2017
M185/2016 & M187/2016

ORDER

Matter No M185/2016

1. Appeal allowed.

2. Set aside orders 2 and 3 of the Full Court of the Federal Court of Australia made on 25 May 2016 in Matter No VID 435 of 2015 and in their place order that:

(a) Appeal allowed in part.

(b) *Set aside declarations 1, 2 and 4 made by the primary judge on 13 August 2015 and in their place declare that by operation of s 413(5) of the* Fair Work Act *2009 (Cth), the industrial action organised by the respondent in relation to a replacement enterprise agreement or agreements for the Esso Gippsland (Longford and Long Island Point) Enterprise Agreement 2011, the Esso Offshore Enterprise Agreement 2011 and the Esso Gippsland (Barry Beach Marine Terminal) Enterprise Agreement 2011, subsequent to the respondent's contravention on 6 March 2015 of the order made by the Fair Work Commission on that date was not protected industrial action.*

(c) *Appeal otherwise dismissed.*

(d) *Remit the matter to a judge of the Federal Court of Australia for the hearing and determination of the appellant's claims for pecuniary penalties and compensation.*

Matter No M187/2016

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation

F Parry QC with M J Follett for the appellant in M185/2016 and for the respondent in M187/2016 (instructed by Clayton Utz)

H Borenstein QC with P C Rozen for the respondent in M185/2016 and for the appellant in M187/2016 (instructed by Maurice Blackburn Lawyers)

CATCHWORDS

Esso Australia Pty Ltd v The Australian Workers' Union
The Australian Workers' Union v Esso Australia Pty Ltd

Industrial relations – *Fair Work Act* 2009 (Cth) – Protected industrial action – Common requirements for industrial action to qualify as protected industrial action – Where s 413(5) of *Fair Work Act* requires that persons organising or engaging in proposed protected industrial action "must not have contravened any orders that apply to them" in relation to relevant agreement – Where order obtained from Fair Work Commission requiring union to stop organising certain industrial action – Where union contravened order – Whether union's contravention of order precluded satisfaction of common requirement in s 413(5) in relation to subsequent industrial action – Whether s 413(5) requires only that relevant persons not be contravening orders extant at time of proposed protected industrial action – Whether relevant contraventions limited to contraventions of orders committed in course of organising or engaging in proposed protected industrial action.

Industrial relations – *Fair Work Act* 2009 (Cth) – Organising, taking or threatening action with intent to coerce contrary to s 343 or s 348 of *Fair Work Act* – Whether person must act with intent that action be unlawful, illegitimate or unconscionable – Whether person must have subjective understanding of factual circumstances rendering action unlawful, illegitimate or unconscionable.

Words and phrases – "coercive action", "common requirements", "compliance with orders", "extant orders", "intent to coerce", "must not have contravened any orders", "past contravention", "protected industrial action", "statutory interpretation", "unlawful, illegitimate or unconscionable".

Fair Work Act 2009 (Cth), ss 343, 348, Ch 3, Pt 3-3, Div 2.

1 KIEFEL CJ, KEANE, NETTLE AND EDELMAN JJ. The *Industrial Relations Reform Act* 1993 (Cth) established a new concept of "protected" industrial action and conferred broad-ranging immunity from civil suit on persons engaging in or organising protected industrial action[1]. The relevant provisions have since been amended and now appear in Div 2 of Pt 3-3 of the *Fair Work Act* 2009 (Cth). These appeals arise out of industrial action that The Australian Workers' Union ("the AWU") took against Esso Australia Pty Ltd ("Esso") early in 2015. The AWU claimed that the industrial action was protected industrial action within the meaning of the *Fair Work Act*. Esso refuted that claim, which led to proceedings culminating in the decision of the Full Court of the Federal Court of Australia[2] and in these appeals. Esso's appeal concerns the meaning of one of the provisions of the *Fair Work Act* that define protected industrial action. The question is whether a person who contravenes an order that is in operation at the time of contravention but that thereafter ceases to operate is a person who has contravened an order that applies to that person within the meaning of s 413(5) of the *Fair Work Act*. For the reasons which follow, the question should be answered yes and the appeal should be allowed.

2 The AWU's appeal relates to coercive conduct of the kind proscribed by ss 343 and 348 of the *Fair Work Act*. The question is whether, in order to amount to organising or taking, or threatening to organise or take, action against another person with intent to coerce the other person within the meaning of s 343 or s 348, the person organising, taking or threatening the action must do so with intent that the action be unlawful, illegitimate or unconscionable. The answer to that question is that a contravention of s 343 or s 348 is constituted of organising, taking or threatening action against another person with intent to negate the other person's choice. It is unnecessary that the person organising, taking or threatening the action know that the action is, or intend that the action be, unlawful, illegitimate or unconscionable. The AWU's appeal should thus be dismissed.

Esso's appeal

Relevant statutory provisions

3 Section 415 of the *Fair Work Act* provides that no action lies under any law (written or unwritten) in relation to any industrial action that is protected

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1 *Industrial Relations Act* 1988 (Cth), ss 170PG, 170PM as inserted by the *Industrial Relations Reform Act* 1993 (Cth), s 21.

2 *Esso Australia Pty Ltd v Australian Workers' Union* (2016) 245 FCR 39.

industrial action unless it has involved or is likely to involve personal injury, wilful or reckless destruction of, or damage to, property, or the unlawful taking, keeping or use of property. Relevantly, industrial action will be protected industrial action for a proposed enterprise agreement under s 408(a) if it is an "employee claim action" for the agreement in the terms of s 409 and if it meets the "common requirements" in s 413.

4 Section 409(1) provides that "employee claim action" for a proposed enterprise agreement is industrial action that is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are, or are reasonably believed to be, only about permitted matters; that is organised or engaged in by a bargaining representative[3] of an employee who will be covered by the agreement or an employee included in a group of employees specified in a "protected action ballot order" for industrial action against an employer that will be covered by the agreement; and that meets the additional requirements in s 409 and the common requirements in subdiv B.

5 Section 413 specifies the common requirements for industrial action to qualify as protected industrial action as follows:

> "*Type of proposed enterprise agreement*
>
> (2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement.
>
> *Genuinely trying to reach an agreement*
>
> (3) The following persons must be genuinely trying to reach an agreement:
>
> (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement – the bargaining representative;
>
> (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement – the bargaining representative of the employee.

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3 See *Fair Work Act* 2009 (Cth), s 176.

Notice requirements

(4) The notice requirements set out in section 414 must have been met in relation to the industrial action.

Compliance with orders

(5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:

(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement – the bargaining representative;

(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement – the employee and the bargaining representative of the employee.

No industrial action before an enterprise agreement etc passes its nominal expiry date

(6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc) by organising or engaging in the industrial action.

No suspension or termination order is in operation etc

(7) None of the following must be in operation:

(a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;

(b) a Ministerial declaration under subsection 431(1) terminating industrial action in relation to the agreement;

(c) a serious breach declaration in relation to the agreement."

6 The notice requirements prescribed by s 414 are in substance that, before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement

must have given written notice of at least three working days after the results of the protected action ballot for the employee claim action have been declared.

7 Protected action ballots are provided for in Div 8 of Pt 3-3 of the *Fair Work Act*. Under s 437, a bargaining representative of an employee who will be covered by a proposed enterprise agreement (or two or more such persons acting jointly) may apply to the Fair Work Commission for a protected action ballot order requiring a protected action ballot to be conducted to determine whether employees wish to engage in the proposed protected industrial action for the agreement. Section 440 requires that notice of the application be given to the employer of the employees who are to be balloted. Section 441 requires that, as far as practicable, the application be determined within two working days of being made. Section 443 directs the Fair Work Commission to make a protected action ballot order if satisfied that the application has been made in accordance with s 437 and that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted. Sections 447 and 448 allow for the variation or revocation of a protected action ballot order on the application of the applicant for the order.

8 Section 460 relevantly provides that an organisation or person who organises or engages in industrial action in good faith on the basis of the declared results of a protected action ballot purporting to authorise the proposed protected industrial action is immune from action (other than action involving personal injury, intentional or reckless destruction of, or damage to, property, or the unlawful taking, keeping or use of property) if it later becomes clear that the action was not authorised by the ballot or if the decision to make the protected action ballot order is quashed or varied on appeal, or review by the Fair Work Commission, after the industrial action is organised or engaged in.

9 Section 418 provides in effect that if it appears to the Fair Work Commission that one or more persons is or are engaging in, threatening or organising industrial action that is not protected industrial action, the Commission must make an order stopping the industrial action or preventing it from occurring or being organised. Section 421 provides inter alia that a person must not contravene an order under s 418, and s 539 provides that contravention of such an order attracts a maximum civil penalty of 60 penalty units.

10 Division 8 of Pt 2-4 of the *Fair Work Act* provides separately for what are called "bargaining orders". In brief, if the Fair Work Commission is satisfied that one or more of the bargaining representatives for a proposed enterprise agreement is or are not meeting the good faith bargaining requirements specified in s 228, the Commission may make an order under s 230 of a kind which, s 231(2) provides, may include the following:

"(a) an order excluding a bargaining representative for the agreement from bargaining;

(b) an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining;

(c) an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining);

(d) an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining)."

11 Section 233 provides that a person must not contravene a bargaining order. A contravention attracts a maximum civil penalty under s 539 of 60 penalty units. If a bargaining representative for an agreement contravenes a bargaining order and an application is made for a serious breach declaration, the Fair Work Commission may make such a declaration under s 235 if satisfied of the matters in sub-s (2), including that:

"(b) the contravention or contraventions:

(i) are serious and sustained; and

(ii) have significantly undermined bargaining for the agreement; and

(c) the other bargaining representatives for the agreement ... have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement; and

(d) agreement on the terms that should be included in the agreement will not be reached in the foreseeable future; and

(e) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement."

12 Once a serious breach declaration has been made, the parties to the dispute have a post-declaration negotiating period of 21 days (which the Fair Work Commission may extend to 42 days) to reach agreement, failing which the Fair Work Commission is required to determine the dispute under s 269 of the *Fair Work Act* by way of a "bargaining related workplace determination".

The facts

13 At relevant times, Esso and the AWU on behalf of its members were bargaining for a new enterprise agreement or agreements to apply at Esso's offshore platforms in Bass Strait, onshore processing plants at Longford and Long Island Point and marine terminal at Barry Beach, Victoria[4]. Consequently, each of Esso and the AWU was a bargaining representative in relation to the proposed enterprise agreement(s) within the meaning of s 176 of the *Fair Work Act*.

14 In support of its claims, the AWU organised, and many of its members took part in, various forms of industrial action against Esso commencing early in 2015[5]. The AWU claimed that all such industrial action was protected industrial action under s 408(a) of the *Fair Work Act*. Esso maintained that some aspects of the industrial action were not.

15 The industrial action which the AWU claimed was protected industrial action, and which Esso disputed, included bans on the performance of equipment testing, air freeing and leak testing[6]. The AWU's bans on those activities were imposed from 2 March 2015. Although the AWU had issued a notice under s 414 of the *Fair Work Act* notifying Esso of action in the form of a ban on the "de-isolation of equipment"[7], which had the effect of engaging the protected industrial action provisions in relation to the "de-isolation of equipment", Esso

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4 *Esso Australia Pty Ltd v Australian Workers' Union* (2015) 253 IR 304 at 308-309 [2], [5]-[6].

5 *Esso v AWU* (2015) 253 IR 304 at 316 [29]-[30].

6 *Esso v AWU* (2015) 253 IR 304 at 322-323 [46], 325 [49]-[50].

7 *Esso v AWU* (2015) 253 IR 304 at 316-318 [31].

maintained that equipment testing, air freeing and leak testing did not fall within the description "de-isolation of equipment" and therefore were not protected industrial action[8].

16 On 6 March 2015, Esso obtained an order from the Fair Work Commission under s 418(1) of the *Fair Work Act*[9]. Clause 4.1 of the order required the AWU (and its delegates, officers, employees and agents) to stop organising certain "industrial action" including any constituting a ban, limitation or restriction on the performance of equipment testing, air freeing or leak testing. The order came into effect at 6.00 pm on 6 March 2015 and ceased to operate at 6.00 pm on 20 March 2015.

17 In contravention of that order, the AWU continued to organise such action, including a ban on air freeing and leak testing between 6.00 pm on 6 March 2015 and 9.30 am on 7 March 2015, and a ban on the manipulation of bleeder valves to facilitate air freeing and leak testing between 9.30 am on 7 March 2015 and 17 March 2015[10].

Proceedings at first instance

18 Esso instituted proceedings in the Fair Work Division of the Federal Court of Australia, pursuant to s 562 of the *Fair Work Act*, seeking inter alia declarations that, because of the contravention of the order of 6 March 2015, the AWU was a person who had contravened an order which applies to it in relation to the agreement to which the proposed protected industrial action related, with the consequence that action thereafter organised by the AWU in relation to the agreement was not protected industrial action. More particularly, Esso contended that, upon the proper construction of s 413(5), once the AWU had contravened the order made on 6 March 2015, the AWU was incapable of satisfying the common requirement specified in s 413(5) of not having contravened an order that applies to it and relates to industrial action relating to the agreement or a matter that arose during bargaining for the agreement. Consequently, it was contended, no further industrial action organised by the AWU in relation to the proposed agreement could qualify as protected industrial action[11].

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8 *Esso v AWU* (2015) 253 IR 304 at 325 [50], 332 [69].

9 *Esso v AWU* (2015) 253 IR 304 at 327-329 [52].

10 *Esso v AWU* (2015) 253 IR 304 at 346-347 [119]-[120].

11 *Esso v AWU* (2015) 253 IR 304 at 348-349 [126]-[129].

19 The primary judge (Jessup J) stated[12] in effect that, but for a previous decision of Barker J in *Australian Mines and Metals Association Inc v Maritime Union of Australia*[13] ("*AMMA*"), his Honour would have been disposed to uphold the construction of s 413(5) for which Esso contended. In *AMMA*, however, Barker J had held[14] that the words "any orders that apply to them and that relate to ... the agreement or a matter that arose during bargaining for the agreement" include only such orders as continue to apply to the bargaining representative at the time of the commencement of the proposed protected industrial action; and, therefore, that, if before that time an order which has been contravened ceases to apply to the bargaining representative, the fact of the previous contravention of the order does not preclude the bargaining representative from satisfying the common requirement specified in s 413(5) in relation to the subsequent industrial action. The primary judge held that, notwithstanding his own view of the effect of the provision, he could not say that Barker J's interpretation of s 413(5) was plainly wrong, and therefore he was bound to follow it[15]. On that basis, the primary judge rejected Esso's claim.

The appeal to the Full Court

20 Esso appealed to the Full Court of the Federal Court (Siopis, Buchanan and Bromberg JJ)[16]. The same Court also heard an appeal against Barker J's judgment in *AMMA*. Reasons for judgment in the two appeals were delivered on the same day. In dismissing the appeal in *AMMA*, Buchanan J (Siopis J and Bromberg J agreeing) added a further qualification to the application of s 413(5)[17]:

> "I agree that s 413(5) is concerned with whether there has been a contravention of orders applying at the time of the taking or organising of the industrial action which is being assessed to see whether it is, or would

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12 *Esso v AWU* (2015) 253 IR 304 at 354 [147].

13 (2015) 251 IR 75.

14 (2015) 251 IR 75 at 98-99 [155]-[159], 100 [169], 101-102 [174]-[175].

15 *Esso v AWU* (2015) 253 IR 304 at 351-352 [135]-[139], 354-355 [144]-[148].

16 *Esso v AWU* (2016) 245 FCR 39.

17 *Australian Mines and Metals Association Inc v Maritime Union of Australia* (2016) 242 FCR 210 at 218 [45] (Siopis J and Bromberg J agreeing at 211 [1], 230 [115]).

be, protected industrial action. Furthermore, it seems to me to be apparent that *any such order would need to be one which could be said to be contravened by the conduct or action of organising or taking the particular industrial action in question*." (emphasis added)

21 Buchanan J also delivered the leading judgment in the decision under appeal. Citing his reasons for dismissing the appeal in *AMMA*, his Honour held[18] that s 413(5) applies only to such orders as are in operation at the time of the proposed protected industrial action that apply to the proposed protected industrial action. In essence, the reasons were that[19]: (1) s 413 states conditions which must be satisfied; (2) s 413(5) is concerned with an assessment of whether the particular industrial action the subject of consideration meets the common requirements stated in s 413; (3) in that context, it is relevant to establish whether the act of organising or engaging in that industrial action has contravened an order which applies to the persons concerned; (4) to be an order which applies to the persons concerned, an order must be "current and operative – ie order(s) applying to the person(s) at the time when the industrial action is being organised or engaged in"; and (5) that is so because the provision is concerned with orders "which might bear directly upon organising or engaging in the industrial action under assessment" and not with "matters more remote from that industrial action or with matters of history".

22 Buchanan J added[20] that:

> "I accept ... that my construction involves subordinating one view of the language of s 413(5) to the premise which, in my view, informs an understanding of its purpose and intended operation. To that extent, it may be correct to say that my construction assumes the opening phrase – '*In organising or engaging in the industrial action*, the following persons etc'.

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18 *Esso v AWU* (2016) 245 FCR 39 at 81 [162] (Siopis J agreeing at 42 [1]). See also at 126 [370] per Bromberg J.

19 *AMMA* (2016) 242 FCR 210 at 227-228 [92]-[94] (Siopis J and Bromberg J agreeing at 211 [1], 230 [115]).

20 *AMMA* (2016) 242 FCR 210 at 229 [101]-[102] (Siopis J and Bromberg J agreeing at 211 [1], 230 [115]).

> That, with respect, does not seem to me to be 'an insertion which is "too big, or too much at variance with the language in fact used by the legislature"'."

Esso's contentions

23 Before this Court, Esso contended, as it had below, that there should be no doubt that the contraventions of orders to which s 413(5) refers are not limited to orders in operation at the time of the proposed protected industrial action, still less to contraventions of orders committed in the course of organising or engaging in the proposed protected industrial action. Section 413(5) expressly refers to contraventions of orders that relate to industrial action relating to a proposed agreement or a matter that arose during bargaining for such an agreement. Consequently, it was submitted, the provision unquestionably contemplates, among its other applications, contraventions of bargaining orders made pursuant to Div 8 of Pt 2-4 of the *Fair Work Act*. In the scheme of things, the Fair Work Commission is likely to make any number of orders of that kind that relate to industrial action relating to a proposed agreement or to a matter that arose during bargaining for the agreement but which do not apply to later acts of organising or participating in industrial action. In Esso's submission, there is nothing in the text or context of s 413(5) which suggests that such orders are excluded from the operation of the sub-section.

24 Further, Esso contended, if s 413(5) had the meaning given to it by the Full Court, it would have the effect that a person organising or engaging in industrial action relating to an agreement could choose to remain in defiance of an order until the order had expired (as it would if the order required something to be done or not done within or for a defined period of time) and then begin to engage in protected industrial action with all the immunity from suit which that entails. Equally, a person could engage in extended defiance of an order, conceivably causing very significant economic loss and other harm to the party the order was designed to protect and to third parties, and then, immediately upon ceasing to defy the order or orders, commence engaging in protected industrial action with immunity from suit. In Esso's submission, that is a most improbable purpose to attribute to the provision, especially when regard is had to its statutory antecedents.

25 Ultimately, in Esso's submission, the natural and ordinary meaning of "any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement" is orders of the specified kind that apply to persons at the time of contravention. The adjectival clause "that apply to them" delineates the persons to whom the orders are directed, just as the adjectival clause "that relate to, or

relate to industrial action relating to, the agreement" delineates the subject matter to which the orders are directed. Each expression is descriptive of the scope of operation of the orders and neither says anything as to the time of their application. The time of application is controlled by the present perfect conditional clause "must not have contravened". To construe the provision in any other way would be both at odds with the sense in which "apply" is used in other provisions of the *Fair Work Act* and productive of the improbable results earlier described.

The AWU's contentions

26 The AWU contended to the contrary that Esso's construction of s 413(5) should be rejected because it would be productive of capricious and unjust results. It would mean, for example, that, if a bargaining representative contravened an order that related to, or related to industrial action relating to, a proposed agreement, no matter how insignificant the order might be or how venial the nature of the contravention, the bargaining representative would thereafter be precluded from organising or engaging in protected industrial action in relation to the proposed agreement. Counsel for the AWU offered by way of example a breach of an order to file a document within a specified time committed by filing the document a day or two late, or a breach of an order to file a document complying with particular requirements committed by filing a document in the belief that it complied with the requirements but which, it was later determined, did not comply. The AWU contended that that would be an extreme and harsh construction, potentially productive of incongruous, irrational and unjust results, and therefore was not one which it should be supposed that Parliament intended.

27 In the AWU's submission, so to construe s 413(5) would also result in double punishment: potential liability to a civil penalty upon contravention and deprivation of the "right" to engage in protected industrial action consequent upon the contravention. Additionally, as the AWU would have it, since the only substantive prerequisite to the Fair Work Commission making an order under s 443 for the holding of a protected action ballot is that the applicant "has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted", it is apparent that s 443 assumes that s 413(5) is confined to contraventions of orders that continue to apply at the time when the protected industrial action is proposed to be taken. Otherwise, s 413(5) would have the unlikely consequence that the whole of the protected action ballot process could be permitted to take place in circumstances where, due to a past contravention of an order no longer in force at the time of ballot, the proposed industrial action would be incapable of qualifying as protected industrial action even if authorised by the ballot. Further, the AWU argued, if s 413(5) referred to

past contraventions of orders which have ceased to operate before the commencement of the proposed protected industrial action, s 413(5) would render s 413(7) otiose. In the AWU's submission, it can also be seen from the Explanatory Memorandum to the Fair Work Bill 2008 (Cth)[21] that the "focus on current compliance is unmistakable"[22], thus implying that s 413(5) is limited to contraventions of orders that continue to apply to the specified persons at the time of the proposed protected industrial action.

28 The AWU sought to uphold the Full Court's construction of s 413(5): that it is restricted to contraventions of extant orders constituted of conduct occurring in the organisation of or engagement in the proposed protected industrial action. Failing that, the AWU submitted by notice of contention, the correct construction of s 413(5) is that it requires that the relevant persons must not be contravening orders that apply to them at the time of the proposed protected industrial action, even if the contravening conduct does not occur in the course of that action.

The meaning of s 413(5)

29 Section 413(5) is poorly drafted. The way it combines the present perfect tense "not have contravened" with the present tense "apply" is potentially ambiguous. Standing alone, the combination could be taken to mean either that a person must not have contravened an order which applied to the person at the time of contravention or, alternatively, that a person must not have contravened an order which continues to apply to the person. The ambiguity could have been avoided by the addition of a couple of extra words. But, since that was not done, it is necessary to look to the history[23] and context[24] of the provision and to relevant extrinsic indicators of its purpose.

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21 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 258 [1635].

22 *AMMA* (2016) 242 FCR 210 at 230 [108] per Buchanan J (Siopis J and Bromberg J agreeing at 211 [1], 230 [115]).

23 See *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; [2012] HCA 55; *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247 at 265-266 [42] per Crennan, Bell and Gageler JJ; [2014] HCA 42. See also *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 379 [8], 389 [77], 390 [86]-[87]; 328 ALR 375 at 378, 391, 393; [2016] HCA 4.

24 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2; *Alcan (NT)*

(Footnote continues on next page)

(i) History

30 At common law, industrial action in the form of strikes and lock-outs was and is, generally speaking, unlawful. In the scheme of things, it is likely to involve a breach of contract and one or more of the industrial torts of nuisance, besetting or inducing breach of contract, or other forms of tortious interference with economic relations[25]. Since 1904, action in the nature of lock-outs and strikes has also been proscribed by Commonwealth industrial legislation[26]. The first relevant statutory definition of "industrial action" was introduced into the *Conciliation and Arbitration Act* 1904 (Cth) in 1977[27] and it has since been carried through in the *Industrial Relations Act* 1988 (Cth)[28], the *Workplace Relations Act* 1996 (Cth)[29] and the *Fair Work Act*, as s 19, in materially similar terms. Statutory power to order participants not to engage in or to desist from industrial action was first conferred on the Industrial Relations Commission by s 127 of the *Industrial Relations Act*[30]. Initially, it was confined to persons engaged in public sector employment. Then, in 1996, s 127 of the *Industrial Relations Act* became s 127 of the *Workplace Relations Act* and its operation was extended to "industrial action" in relation to an industrial dispute, the negotiation of a "certified agreement" (an antecedent of enterprise agreements) and work

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Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [24], 391-392 [30]-[31] per French CJ and Hayne J, 411-412 [88]-[89] per Kiefel J; [2012] HCA 56.

25 See generally *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328-330 [19]-[23] per Gleeson CJ; [2004] HCA 40; *National Workforce Pty Ltd v Australian Manufacturing Workers' Union* [1998] 3 VR 265.

26 See *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), ss 6, 7, 8. See also ss 32 and 33 as enacted by the *Conciliation and Arbitration Act* 1972 (Cth), s 13.

27 *Conciliation and Arbitration Amendment Act (No 3)* 1977 (Cth), s 3.

28 Section 4(1).

29 Section 4(1).

30 See and compare *Conciliation and Arbitration Act*, ss 32, 33.

regulated by an award or certified agreement. In 2005, as part of the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth), s 127 was amended and extended to all industrial action that was not "protected". It was renumbered as s 496 of the *Workplace Relations Act*. What was then s 496 now appears in relevantly similar terms as s 418 of the *Fair Work Act*.

31 As was earlier noticed, the concept of protected industrial action was established by the enactment of the *Industrial Relations Reform Act*. Following its enactment in 1993, s 170PM of the *Industrial Relations Act* conferred a broad statutory immunity from civil suit on persons who engaged in "industrial action" that was "protected". The immunity thus created was in substance then re-enacted as s 170MT of the *Workplace Relations Act*, later renumbered as s 447 of the same Act, and now continues in substantially similar but textually different form as s 415 of the *Fair Work Act*. Since 1993, the conditions that must be satisfied in order for industrial action to qualify as protected industrial action have also been expanded. As the primary judge observed[31], the condition now embodied in s 413(5) originated in s 170PI(1) of the *Industrial Relations Act*, which was as follows:

> "The engaging in industrial action by a person who is a member of an organisation of employees is not protected action unless the organisation has, before the person begins to engage in the industrial action:
>
> (a) tried to reach agreement with the employer; and
>
> (b) if the Commission has made an order as mentioned in section 170QK in relation to the negotiations – *complied with the order in so far as it applies to the organisation*." (emphasis added)

32 Section 170QK relevantly provided that:

> "(2) The Commission may make orders under paragraph 111(1)(t) for the purpose of:
>
> (a) ensuring that the parties negotiating an agreement under this Part do so in good faith; or

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31 *Esso v AWU* (2015) 253 IR 304 at 349 [131].

(b) promoting the efficient conduct of negotiations for such an agreement; or

(c) otherwise facilitating the making of such an agreement.

In particular, the Commission may, for such a purpose, order a party to take, or refrain from taking, specified action.

(3) In deciding what orders (if any) to make, the Commission:

(a) must consider the conduct of each of the parties to the negotiations, in particular, whether the party concerned has:

(i) agreed to meet at reasonable times proposed by another party; or

(ii) attended meetings that the party had agreed to attend; or

(iii) complied with negotiating procedures agreed to by the parties; or

(iv) capriciously added or withdrawn items for negotiation; or

(v) disclosed relevant information as appropriate for the purposes of the negotiations; or

(vi) refused or failed to negotiate with one or more of the parties; or

(vii) in or in connection with the negotiations, contravened section 170RB by refusing or failing to negotiate with a person who is entitled under that section to represent an employee; and

(b) may consider:

(i) proposed conduct of any of the parties (including proposed conduct of a kind referred to in paragraph (a)); and

(ii) any other relevant matter."

33 In 1996, ss 170PI and 170QK were repealed but the former was re-enacted in substantially similar terms as s 170MP(1) of the *Workplace Relations Act* as follows:

> "Engaging in industrial action by a person who is a member of an organisation of employees that is a negotiating party is not protected action unless the organisation has, before the person begins to engage in the industrial action:
>
> (a) genuinely tried to reach agreement with the employer; and
>
> (b) if the Commission has made an order in relation to the negotiations – *complied with the order in so far as it applies to the organisation*." (emphasis added)

34 Then, in 2005, s 170MP was repealed and replaced with s 443(1) of the *Workplace Relations Act*, thus:

> "If:
>
> (a) an organisation of employees is a negotiating party to a proposed collective agreement; and
>
> (b) the Commission has, during the bargaining period, made or given orders or directions that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement;
>
> industrial action engaged in by a person who is a member of the organisation is not protected action *unless, before the person begins to engage in the industrial action, the organisation has complied with the order or direction so far as it applies to the organisation*." (emphasis added)

35 As the primary judge observed[32], it appears that s 170MP, and later s 443(1), of the *Workplace Relations Act* was capable of application to an organisation that had not complied with an order where it remained possible to comply with the order before the commencement of the proposed protected industrial action. By contrast, his Honour said, there might have been an

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32 *Esso v AWU* (2015) 253 IR 304 at 350-351 [133].

argument as to whether the provision applied where an organisation had failed to comply with an order and it had ceased to be possible to comply. Presumably, what his Honour meant was that, because the *Workplace Relations Act* was expressed in terms of *compliance*, it more naturally conveyed the sense of orders with which it was still possible to comply. By contrast, the same cannot be said of s 413(5) of the *Fair Work Act*. Although the title of s 413(5) still makes reference to "Compliance with orders", the change from "*has complied* with the order or direction so far as it applies to the organisation" (emphasis added), in the body of s 443(1) of the *Workplace Relations Act*, to "*have [not] contravened* any orders that apply to them" (emphasis added), in the body of s 413(5) of the *Fair Work Act*, bespeaks an explicit change in emphasis from a state of *compliance* with orders to a state of *absence of past contravention* of orders. And, so far as can be seen, the only reason for the change is to make clear, or possibly clearer, that the provision applies to past contraventions of orders.

(ii) Context

36 That impression is fortified by the structure of s 413 of the *Fair Work Act*: in particular the phenomenon that sub-ss (2) and (3) are expressed in the present tense, sub-ss (4) and (5) are expressed in the present perfect tense and sub-ss (6) and (7) revert to the present tense. In s 413(2), the present tense "is a greenfields agreement" mandates that the inquiry which it posits is whether the proposed agreement *is* a greenfields agreement: an inquiry as to what exists at the time of inquiry. In the same way, in s 413(3), the present tense "must be genuinely trying" dictates that there must be in existence a genuine attempt to reach agreement. By contrast, in s 413(4), the present perfect tense "must have been met" signifies that the inquiry posited is as to something that has already been done or, more accurately, that was required to be and was done. It mandates that the requirements set out in s 414 relating to notice must have been complied with at a point in time before – indeed, at least three working days before[33] – the point of inquiry. So, too, in s 413(5), the present perfect tense "must not have contravened" conveys that s 413(5) is directed to non-contravention of an order that was required to be complied with before the time of inquiry and mandates that there have been no past contraventions of any such order. Then, the return to the present tense in s 413(6) and (7) signifies that sub-ss (6) and (7), like sub-ss (2) and (3), are concerned with what is happening at the point of inquiry. Specifically, in s 413(6), the present tense "must not contravene section 417" conveys that the person organising or engaging in the proposed protected industrial action must not be contravening s 417; and, in s 413(7), the present

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33 *Fair Work Act*, s 414(2).

tense "must [not] be in operation" conveys that there must not be in current operation any of the specified types of orders or declarations.

37 In short, the statutory pattern of s 413 presents as being that, where a sub-section of s 413 is directed to events that are occurring at present, the sub-section is drafted in the present tense and, where a sub-section is directed to events that have occurred in the past, the sub-section is drafted in the present perfect tense.

38 Certainly, as the AWU contended, one must also have regard to the way that s 413(5) combines the present perfect tense "must not have contravened" with the present tense "orders that apply". More precisely, if it is accepted that the present perfect tense "must not have contravened" signifies that the provision is directed to past contraventions of orders, should the present tense "orders that apply" be taken to mean that, although concerned with past contraventions, s 413(5) applies only to past contraventions of orders that are still in operation at the time of the proposed protected industrial action[34]? As will be seen, s 413(5) should not be construed as being so limited.

39 Perhaps, if s 413(5) had been expressed in the way that s 443(1) of the *Workplace Relations Act* was expressed – in terms of *compliance* with orders – it would have been arguable that the provision was so confined. But, even then, as counsel for the AWU fairly conceded, it would have been a most unlikely construction. What purpose could there be in affording the immunity of protected industrial action to persons who had contravened orders, merely because there remained another order or orders with which it was still possible to comply? Given that the *Fair Work Act* regime was then and remains predicated on participants abiding by the rules, it is much more likely that the purpose of a provision in that form would have been to deny the immunity of protected industrial action to persons who had not previously complied with a pertinent order or orders and who had thereby demonstrated that they were not prepared, or prepared to take sufficient care, to play by the rules.

40 Conceptually, there might also have been something more to be said for the view that found favour with Buchanan J[35] that s 413(5) is confined to compliance with orders which apply to the proposed protected industrial action. But the textual difficulties in the way of such an interpretation are insurmountable. Standing alone, the descriptor "that relate[s] to, or relate[s] to

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34 See *AMMA* (2015) 251 IR 75 at 100 [166]-[169].

35 See *AMMA* (2016) 242 FCR 210 at 228 [94] (Siopis J and Bromberg J agreeing at 211 [1], 230 [115]).

industrial action relating to, the [proposed] agreement" could perhaps be seen as directed to orders which "bear directly upon organising or engaging in the industrial action under assessment", as Buchanan J suggested. But, in context, the expression "that relate[s] to, or relate[s] to industrial action relating to ... a matter that arose during bargaining for the [proposed] agreement" is plainly not so limited.

41 In any event, the change in language from the requirement for *compliance* with an order (as was prescribed by s 443(1) of the *Workplace Relations Act*) to the requirement for *non-contravention* of an order (as prescribed by s 413(5) of the *Fair Work Act*) in effect resolves any doubt. Syntactically, a condition that there has not been a contravention of an order necessitates that there has not been non-compliance with an order with which it was necessary to comply. There is nothing in or about that which suggests that the order must be one that continues in operation at the time of the proposed protected industrial action, or with which it is still possible to comply at that time, or that it be an order that would apply to the proposed protected industrial action.

42 Contrary to the AWU's submissions, the extrinsic materials are to the same effect. Relevantly, what is there said about the operation of s 413(5) is that[36]:

> "Specified persons organising or engaging in industrial action must not have contravened any orders that apply to them relating to the industrial action, the proposed enterprise agreement or a matter that arose during bargaining for the proposed enterprise agreement (subclause 413(5)). Examples of orders are bargaining orders made by [the Fair Work Commission] in response to a failure to meet the good faith bargaining requirements."

Nothing in or about that suggests the provision is restricted to contraventions of orders which continue to apply after contravention, or with which there may yet be compliance, or which relate to the proposed protected industrial action.

43 That conclusion is also supported by the implications of the difference in language between s 413(5) and s 413(7). When s 413(7) refers to orders which are in operation at the relevant time, it refers to them as orders which are "*in operation*" and not as orders that "*apply*". If the application of s 413(5) were

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36 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 263 [1664].

intended to be restricted to non-contravention of orders that are in operation, it is to be expected that s 413(5) would likewise refer to orders that are *in operation* and not to orders that *apply*. The fact that s 413(5) refers to "orders that apply to them" and not to orders which are "in operation" thus strengthens the conclusion that "apply to them" is used adjectivally to delineate the persons to whom the orders apply, just as "relate to ... the agreement or a matter that arose during bargaining for the agreement" is deployed adjectivally to delineate the matters to which the orders relate. In the result, in order to engage s 413(5), an order must have two qualities: it must be addressed to the relevant persons and it must deal with the relevant subject matter.

(iii) Relevance of conditions for protected action ballots

44 The AWU's contention based on the supposed inutility of conducting a protected action ballot if the proposed protected industrial action cannot meet the common requirements because of a past contravention of an order should be rejected. As is mentioned in the Explanatory Memorandum to the Fair Work Bill[37], the scheme of the legislation was previously that an employer could apply for an order staying a protected action ballot in the event that the employer challenged that there had been compliance with other requirements for protected industrial action[38]. The ability of an employer to make an application of that kind was abrogated by the current legislation but with retention of the ability of an employer to apply to the Fair Work Commission, once a ballot has been conducted, for a declaration that other requirements of protected industrial action have not been complied with[39]. As it was put in the Explanatory Memorandum[40]:

> "Employers will still have recourse to [the Fair Work Commission] if industrial action is taken after the ballot and it is found that the other (non-ballot) requirements for protected action have not been met (for example, the party taking action is not genuinely trying to reach agreement)."

That is what Esso did in this case.

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37 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at lviii [r.276], lx [r.295].

38 See *Workplace Relations Act* 1996 (Cth), ss 458, 459, 488, 489. See also s 461(2).

39 *Fair Work Act*, s 418.

40 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at lx [r.295].

45 It is also to be observed that it is not just failure to meet the common requirement specified in s 413(5) that may render a protected action ballot nugatory. The existence of a serious breach declaration has the same effect by operation of s 413(7).

(iv) Section 413(7) not otiose

46 The AWU's contention that construing s 413(5) as applicable to past contraventions of orders would render s 413(7) otiose is unpersuasive. The matters for which s 413(7)(a) and (b) provide are not covered by s 413(5) and, although s 413(7)(c) involves more complex considerations, it is apparent that sub-ss (5) and (7) are concerned with essentially different circumstances.

47 Section 413(5) applies to bargaining representatives who are organising or engaging in industrial action, and to employees who are organising or engaging in industrial action, in relation to contraventions of orders that relate to the agreement the subject of the proposed protected industrial action or a matter that arose during bargaining for the agreement. And the bulk of orders that "relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement" are likely to be orders made by the Fair Work Commission under s 418 stopping industrial action that is not protected. By contrast, s 413(7)(c) applies only to bargaining representatives and only to serious and sustained breaches of bargaining orders that result in a serious breach declaration[41]. Granted, the expression in s 413(5) "orders that ... relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement" is arguably broad enough to capture a bargaining order made under s 230, contravention of which may result in a serious breach declaration to which s 413(7) applies. But, inasmuch as s 413(7) provides expressly for situations where serious contraventions of bargaining orders by bargaining representatives result in serious breach declarations, it appears implicitly to exclude such breaches of bargaining orders from the more general category of contraventions of orders described in s 413(5): *expressum facit cessare tacitum*[42].

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41 *Fair Work Act*, s 235.

42 See for example *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J; [1932] HCA 9; *R v Wallis* (1949) 78 CLR 529 at 550 per Dixon J; [1949] HCA 30; *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678-679 per Mason J (Barwick CJ and Aickin J agreeing at 674, 680); [1979] HCA

(Footnote continues on next page)

48 Even if that were not so, however, the fact that there might be some degree of potential overlap between the more general provision of s 413(5) and the more specific provision of s 413(7) would not justify confining s 413(5) to orders that are in existence or may still be complied with at the time of the proposed protected industrial action, or which relate to the proposed protected industrial action. There is no basis in the text for any such limitation. The more probable conclusion would be that it was considered appropriate to make specific additional provision for the consequences of a serious breach declaration because a serious breach declaration has the effect that the bargaining process is likely to be terminated and the terms of the proposed enterprise agreement determined by the intervention of the Fair Work Commission[43]; and because, whereas the requirements of s 413(5) can be met by the exclusion from industrial action of a person who has contravened an order of the kind referred to in s 413(5), the application of s 413(7) cannot be avoided by the exclusion of a person involved in a breach the subject of the serious breach declaration.

(v) Not productive of capricious, unjust results

49 The AWU's contention that to construe s 413(5) in the manner contended for by Esso would be productive of capricious, unjust results is also unpersuasive. The Fair Work Commission has broad powers under s 603 of the *Fair Work Act* to vary or revoke orders, including power to vary or revoke orders retrospectively[44]. The very considerable breadth of the power accorded by s 603 stands in contrast to the more limited power accorded by s 602 to correct "obvious errors". Thus, although it has been said that courts should eschew the exercise of inherent power to vary an order *nunc pro tunc* where the variation

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26; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 586-589 [54]-[59] per Gummow and Hayne JJ; [2006] HCA 50; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 176-177 [50] per French CJ; [2011] HCA 32.

43 *Fair Work Act*, s 269.

44 See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte North Melbourne Electric Tramways and Lighting Co Ltd* (1920) 29 CLR 106 at 110-111 per Knox CJ, Gavan Duffy and Starke JJ, 111 per Isaacs and Rich JJ; [1920] HCA 82; *Monard v H M Leggo & Co Ltd* (1923) 33 CLR 155 at 170 per Higgins J; [1923] HCA 53; *R v Isaac; Ex parte State Electricity Commission (Vict)* (1978) 140 CLR 615 at 619 per Gibbs J, 624 per Mason J; [1978] HCA 33. See also *Grabovsky v United Protestant Association of NSW Ltd* [2015] FWC 5161 at [36]-[38]; *Rheem - Rydalmere Plant Industrial Action Order 2002* [PR929970] at [38].

would have the effect of altering the substantive rights of the parties[45], the statutory power accorded by s 603 is different. As was observed in *George Hudson Ltd v Australian Timber Workers' Union*[46] in relation to the retrospective operation of the *Conciliation and Arbitration Act*, the provisions of that Act were not to be read down as if confined to a prospective operation at the expense of the "great public policy" which the Act embodied, namely, that of encouraging and maintaining "industrial peace in the Commonwealth". So also, in *Australian Tramway and Motor Omnibus Employees Association v Commissioner for Road Transport and Tramways (NSW)*[47], the Court held that the Conciliation Commissioner had power to vary the terms of an award that had expired (but continued in force by operation of statute). As Murphy J stated in *R v Gough; Ex parte Key Meats Pty Ltd*[48], it was clear that the Australian Conciliation and Arbitration Commission was entitled to vary or set aside an award provision in accordance with the Act even if its new provision operated "locally, temporarily, prospectively or retrospectively, provided the provision would have been within the scope or ambit of the original dispute". The same considerations informed this Court's decision in *Re Dingjan; Ex parte Wagner*[49] that the power to set aside or vary the terms of a harsh or unfair contract under ss 127A and 127B of the *Industrial Relations Act* could be exercised in relation to a contract that had been discharged. And the same is surely true of the Fair Work Commission's statutory power under s 603 of the *Fair Work Act* to vary or revoke orders relating to a proposed agreement or matters arising during the bargaining for such an agreement. To adopt and adapt the language of Kirby J in *Emanuele v Australian*

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45 See *Mealing v P Chand* (2003) 57 NSWLR 305 at 306-307 [8]-[9] per Handley JA (Meagher ACJ and Young CJ in Eq agreeing at 306 [1], 308 [20]); *Hartley Poynton Ltd v Ali* (2005) 11 VR 568 at 581-609 [24]-[80] per Ormiston JA (Buchanan JA and Eames JA agreeing at 620 [113], [114]); *Castle Constructions Pty Ltd v North Sydney Council* (2007) 155 LGERA 52 at 80 [97] per Tobias JA (Bell J agreeing at 90 [143]); *MAC v The Queen* (2012) 34 VR 193 at 196 [11], 198 [22], 199 [24]-[25] per Nettle JA (Bongiorno JA agreeing at 204 [50]).

46 (1923) 32 CLR 413 at 434-436 per Isaacs J (Starke J agreeing at 453); [1923] HCA 38. See also at 446-450 per Higgins J.

47 (1935) 54 CLR 470 at 490-492 per Latham CJ, 493-494 per Rich, Evatt and McTiernan JJ, 498-499 per Starke J, 503-504 per Dixon J; [1935] HCA 77.

48 (1982) 148 CLR 582 at 597; [1982] HCA 12.

49 (1995) 183 CLR 323 at 362-363 per Gaudron J (Mason CJ, Deane J and Toohey J relevantly agreeing at 333, 342, 356); [1995] HCA 16.

Securities Commission[50], it may be inferred that Parliament contemplated that oversight and inadvertence would sometimes occur for which the Fair Work Commission's powers of variation and revocation under s 603 would be available[51].

50 Hence, if a document cannot be filed within the time specified in an order made by the Fair Work Commission, an application might be made for the time to be enlarged, or alternatively for the order to be revoked and a new order made allowing greater time, and, if there were good reason for the failure to file the document timeously, no doubt time would be enlarged, especially when it is appreciated that to refuse to enlarge time would preclude the possibility of protected industrial action by reason of s 413(5). Similarly, if a document were filed within time but later found not to comply with requirements imposed by the Fair Work Commission, and there was a satisfactory excuse for the failure in compliance, time in which to file a document complying with requirements might be enlarged retrospectively[52]. If, in exercise of the power conferred by s 603, an order were made by the Fair Work Commission varying or revoking a previous order with effect from a time earlier than the alleged contravention, the effect would be that there would not have been a contravention of the order. If, however, it appeared that the failure to file the document on time or to file what was required by the previous order was the result of contumaciousness or unacceptably careless disregard for the terms of the order, or if it were thought that to alter the order retrospectively would amount to an inappropriate or unfair interference with the rights of the parties, it might be expected that the Fair Work Commission would decline to exercise the power conferred by s 603 with the effect that the immunity attaching to protected industrial action would not arise.

51 Moreover, whether or not s 603 were available or adequate to overcome all such procedural or inconsequential breaches of orders by variation or revocation of those orders, the possibility that minor or unintended breaches of orders could preclude protected industrial action would not be a sufficient reason to construe s 413(5) as it was construed by the Full Court. For the reasons

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50 (1997) 188 CLR 114 at 156; [1997] HCA 20.

51 Cf *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314; [2008] HCA 9. See and compare *Carey v Australian Broadcasting Corporation* (2012) 84 NSWLR 90 at 99 [43]-[44] per Beazley JA, 103-107 [71]-[93] per McColl JA, 110-113 [114]-[126] per Sackville AJA.

52 See generally *Hartley Poynton* (2005) 11 VR 568 at 588-589 [39], 602-604 [68]-[69] per Ormiston JA (Buchanan JA and Eames JA agreeing at 620 [113], [114]).

already given, the change in tense from the present tense in s 413(2) and (3), to the present perfect tense in s 413(4) and (5), followed by the change back to the present tense in s 413(6) and (7), read in context, leaves no room for doubt that the Parliament intended s 413(5) to apply to past contraventions of orders. Thus, even accepting for argument's sake that the Parliament did not foresee that s 413(5) might be taken to apply to a past venial breach of a minor order, or a past unintended breach of an order about which no issue was taken until much later, it still could not be concluded that the Parliament did not intend s 413(5) to apply to past contraventions of orders. The only proper conclusion would be that the Parliament overlooked an unintended consequence of its intended operation of s 413(5).

52 The Court's ability to construe a statutory provision in a manner that departs from the natural and ordinary meaning of the terms of the provision in the context in which they appear is limited to construing the provision according to the meaning which, despite its terms, it is plain that Parliament intended it to have[53]. It is not the Court's function to attempt to overcome unintended consequences of the intended operation of a provision by construing the provision as if it had a meaning that Parliament did not intend it to have. To do so would go beyond the judicial function of construing legislation according to established precepts of statutory construction and into the legislative realm of amending the Act by reference to what it may be supposed Parliament might have provided if it had considered the specific circumstances before the Court[54]. Accordingly, since it is clear that s 413(5) was intended to apply to past contraventions of orders, it is not open to construe the provision as if it did not apply to past contraventions, or as if its operation were somehow restricted to orders that continue to operate or which apply only to the proposed protected

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53 See *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105-106 per Lord Diplock; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305 per Gibbs CJ, 310 per Stephen J, 319-321 per Mason and Wilson JJ, 336 per Aickin J; [1981] HCA 26; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423 per McHugh JA; *IW v City of Perth* (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J; [1997] HCA 30; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113-116 per McHugh J; [1997] HCA 53.

54 *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 at 191 per Lord Simonds; *Marshall v Watson* (1972) 124 CLR 640 at 644 per Barwick CJ (McTiernan J agreeing at 646), 649 per Stephen J (Menzies J agreeing at 646); [1972] HCA 27.

industrial action. There is no basis in the text of the legislation or otherwise for the implication of words of that kind.

(vi) No double punishment

53 Finally, the AWU's contention that so to construe s 413(5) would have the effect of doubly punishing those who contravene a relevant order – by the imposition of a civil penalty and by denying immunity from suit in respect of what would otherwise be protected industrial action – takes the matter no further. The denial of what the AWU calls the "right" to engage in protected industrial action is not a punishment. The punishment for contravention is the applicable civil penalty[55]. By contrast, the scheme of s 413 is that the ability to engage in industrial action in relation to an agreement under the immunity from civil suit provided by s 415 is a privilege that, according to the express terms of that privilege in s 413, is conditioned upon the absence of past contraventions by persons organising or engaging in the proposed protected industrial action of orders that relate to the proposed agreement or a matter arising in the course of bargaining for the proposed agreement. The apparent purpose of so providing is to ensure that persons who have shown that they cannot be trusted to comply with orders relating to the agreement or matters arising from bargaining for the agreement are not to be trusted with the immunity afforded in relation to protected industrial action. For the same reasons, the fact that the breach of a bargaining order attracts a civil penalty under s 233 is not a reason to deny s 413(7) its plain and ordinary effect.

The AWU's appeal

54 The issue in the AWU's appeal may be dealt with more briefly. The question is whether it is sufficient to constitute organising or taking, or threatening to organise or take, action with intent to coerce another person contrary to s 343 or s 348 of the *Fair Work Act* for the person organising, taking or threatening the action to intend it to cause the other person to agree to terms with which the other person would not otherwise agree, or whether it is also necessary for the person organising, taking or threatening the action to know, and therefore intend, that the action is or will be unlawful, illegitimate or unconscionable.

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55 *Fair Work Act*, s 539.

55 Section 343 of the *Fair Work Act* provides that:

> "(1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
>
> (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
>
> (b) exercise, or propose to exercise, a workplace right in a particular way.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).
>
> (2) Subsection (1) does not apply to protected industrial action."

56 Section 348 is in similar terms and provides:

> "A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.
>
> Note: This section is a civil remedy provision (see Part 4-1)."

57 For the purposes of s 343, a "workplace right" is defined by s 341(1) and (2) to include making, varying or terminating an enterprise agreement. For the purposes of s 348, "engage in industrial activity" is defined by s 347 to include complying with a lawful request made by an industrial association, for example, as here, a request to enter into an enterprise agreement. It is not in issue that the AWU banned the performance of equipment testing, air freeing and leak testing with intent to influence Esso to enter into a proposed enterprise agreement on terms stipulated by the AWU[56].

58 Section 361 of the *Fair Work Act* relevantly provides that where it is alleged that a person took action for a particular reason or with a particular intent, and taking the action for that reason or with that intent would constitute a contravention of Pt 3-1 (which includes ss 343 and 348), it is presumed that the action was taken for that reason or with that intent unless the person proves otherwise. Thus the burden of proof was on the AWU to establish the absence of coercive intent in relation to ss 343 and 348.

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56 See *Esso v AWU* (2015) 253 IR 304 at 360 [171], 361 [174].

59 The AWU put its case below[57] on the basis that, because its relevant officers did not appreciate that the bans on equipment testing, air freeing and leak testing were not protected industrial action, it was not established that the officers acted with intent to commit acts which were unlawful, illegitimate or unconscionable, and so was not established that the AWU had organised the action with intent to coerce.

60 The primary judge and a majority of the Full Court rejected that argument. Their Honours held[58] that it was sufficient to constitute organising, taking or threatening action with intent to coerce a person within the meaning of s 343 or s 348 of the *Fair Work Act* to organise, take or threaten action which is unlawful, illegitimate or unconscionable with intent to negate the person's choice. It was not necessary, they held, that the person organising, taking or threatening the action know or intend that the action will be unlawful, illegitimate or unconscionable. Hence, because the AWU had imposed the bans on the performance of equipment testing, air freeing and leak testing with intent to influence Esso to enter into a proposed enterprise agreement on terms favourable to the AWU, the AWU had taken action that was unlawful, illegitimate or unconscionable to coerce Esso to exercise a workplace right or engage in industrial activity within the meaning of ss 343 and 348.

61 The idea that the action must be unlawful, illegitimate or unconscionable to amount to coercion within the meaning of s 343 or s 348 of the *Fair Work Act* derives from McHugh JA's statement in *Crescendo Management Pty Ltd v Westpac Banking Corporation*[59] of the elements of common law economic duress. It has since been held that the same applies to ss 343 and 348[60]; although it is not immediately apparent why that should be so. Apart from anything else, s 343(2) provides that s 343(1) does not apply to protected industrial action. That suggests perhaps that the statutory conception of coercion is otherwise broad

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57 *Esso v AWU* (2015) 253 IR 304 at 360 [171]; *Esso v AWU* (2016) 245 FCR 39 at 84 [175], 85 [188] per Buchanan J (Siopis J agreeing at 42 [1]).

58 *Esso v AWU* (2015) 253 IR 304 at 359 [166]; *Esso v AWU* (2016) 245 FCR 39 at 84 [176], 86-87 [194], 89 [200]-[201] per Buchanan J (Siopis J agreeing at 42 [1], Bromberg J not deciding at 128 [381]).

59 (1988) 19 NSWLR 40 at 45-46 (Samuels JA and Mahoney JA agreeing at 41).

60 See for example *Fair Work Ombudsman v National Jet Systems Pty Ltd* (2012) 218 IR 436 at 440 [12], 443 [23]; *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172 at 192 [91]-[92] per Buchanan and Griffiths JJ.

enough to embrace protected industrial action, and thus coercion by lawful or legitimate means. If that is so, it would assume significance in relation to s 348, which has no express exclusion of protected industrial action. In this case, however, it is unnecessary to decide whether that is so. Either way, it is clear that a person taking coercive action need not have an accurate appreciation of the legal nature of the action. As Gleeson CJ said in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[61] in relation to s 170NC of the *Workplace Relations Act*, it was sufficient to establish an intent to coerce to demonstrate that the person organising, taking or threatening the action intended it to negate the other person's choice and that the person organising, taking or threatening the action had actual knowledge of circumstances that made his or her conduct coercive:

> "The elements of the conduct prohibited by s 170NC, so far as presently relevant, are action, or threats of action, with intent to coerce another to agree, or not to agree, to the making of an agreement under Div 2 or Div 3. An accurate appreciation of the legal nature of the agreement in question is not an element of the intent required by s 170NC."

The fact that a person may be acting under a mistake of law as to whether industrial action is protected industrial action is no more relevant than would be the fact that the person neither knew nor cared whether the industrial action was protected industrial action[62]. The same applies to ss 343 and 348 of the *Fair Work Act*.

62 In the course of oral argument before this Court, the AWU sought to put its case on a further basis apparently different from the way it was put below. Counsel for the AWU accepted that a person taking coercive action need not have a correct legal appreciation of his or her conduct or otherwise appreciate that the action is unlawful, illegitimate or unconscionable, but, relying on Merkel J's reasoning in *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[63], counsel submitted that it was necessary for the person taking the action to have a subjective understanding of the circumstances that, viewed objectively, would be perceived as rendering the action unlawful, illegitimate or unconscionable. Thus, it was contended, because the relevant

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61 (2004) 221 CLR 309 at 330-331 [26].

62 See *Electrolux* (2004) 221 CLR 309 at 330 [25] per Gleeson CJ.

63 (2001) 109 FCR 378 at 386-388 [30]-[43].

officers of the AWU believed, as a matter of fact, that equipment testing, air freeing and leak testing were acts within the description "de-isolation of equipment", they lacked subjective knowledge of the circumstance that, viewed objectively, placed the action beyond the reach of the immunity for protected industrial action and so into a category of action that, objectively discerned, would be seen as unlawful, illegitimate or unconscionable.

63 Assuming, without deciding, that the analysis in *Seven Network* is applicable to ss 343 and 348 of the *Fair Work Act*; that the analysis supports the AWU's contention; and that a belief that equipment testing, air freeing and leak testing are acts within the description "de-isolation of equipment" amounts to a mistake of fact as opposed to a mistake of law or of mixed fact and law[64], the problem with the AWU's further submission is that the evidence adduced below does not go as far as establishing that the relevant officers of the AWU truly believed as a matter of fact that equipment testing, air freeing and leak testing were "de-isolation of equipment". The evidence to which this Court was referred[65] as supporting the AWU's submission at best shows that, in its bargaining with Esso, the AWU maintained that equipment testing, air freeing and leak testing were "de-isolation of equipment" within the scope of the protected industrial action notice and, on that basis, that the bans would be maintained. Although there was evidence that some employees and members of the AWU considered that the bans should be maintained[66], counsel for the AWU could point to no evidence that any of the relevant officers of the AWU, let alone all of the relevant officers of the AWU involved in organising the bans, honestly believed as a fact that equipment testing, air freeing and leak testing were "de-isolation of equipment". Hence, even if it were necessary for the AWU's officers to have had a subjective understanding of the factual circumstances that, viewed objectively, would be seen as rendering the bans unlawful, illegitimate or

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64 See and compare *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395; [1996] HCA 36; *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7 per Mason J (Gibbs and Stephen JJ, Murphy J and Aickin J agreeing at 3, 11); [1980] HCA 16; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450-452 [24]-[28] per Gleeson CJ, Gummow and Callinan JJ, 477-478 [108] per Hayne J; [2001] HCA 12; *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 212 CLR 411 at 427-428 [36] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 59.

65 *Esso v AWU* (2015) 253 IR 304 at 322-323 [46], 325 [49], 330-331 [58], [61]-[64]. Cf at 335 [78]-[79], 336-337 [84].

66 *Esso v AWU* (2015) 253 IR 304 at 329 [55], 330 [58].

unconscionable, the AWU has not established, as s 361 requires, that those persons lacked subjective knowledge of those facts.

Conclusion

64 It follows from these reasons that Esso's appeal should be allowed and the notice of contention rejected. Orders 2 and 3 made by the Full Court in VID 435 of 2015 should be set aside. In lieu thereof, it should be ordered that the appeal to the Full Court be allowed in part; declarations 1, 2 and 4 made by the primary judge on 13 August 2015 be set aside; and, in place of those declarations, it should be declared that, as a result of the AWU's contravention of the order of 6 March 2015, the AWU was a person who has contravened an order which applies to it in relation to the proposed agreement and, therefore, by reason of the AWU's failure to meet the common requirement specified in s 413(5), that industrial action thereafter organised by the AWU in relation to the proposed agreement was not protected industrial action. The AWU's appeal should be dismissed. The matter should be remitted to a judge of the Federal Court for the hearing and determination of Esso's claims for pecuniary penalties and compensation.

65 GAGELER J. The employer, Esso, and the employee organisation, the AWU, both appeal from the decision of the Full Court of the Federal Court in *Esso Australia Pty Ltd v Australian Workers' Union*[67]. For the reasons given by Kiefel CJ, Keane, Nettle and Edelman JJ, I would dismiss the appeal by the AWU. For the reasons which follow, I would also dismiss the appeal by Esso.

66 Esso's appeal turns on choosing between alternative constructions of "must not have contravened" in s 413(5) of the *Fair Work Act*. The choice comes down to whether "must not have contravened" is better construed as denoting: the absence of a past event (so as to be equivalent to "did not contravene"), as Esso argues; or the absence of a present state resulting from a past event (so as to be equivalent to "is not in contravention of"), as the AWU in substance argues on its notice of contention.

67 Neither construction is ungrammatical. In grammatical terms, the question is whether "must not have contravened" is expressed in the experiential form of the present perfect tense, used to refer to an event having occurred in the past, or in the resultative form of the present perfect tense, used to refer to an existing state produced by an event that occurred in the past[68]. The modal auxiliary "must" and the fact that the provision is framed negatively do not alter that question or affect its resolution.

68 Neither construction is manifestly absurd or unjust. No grand common law presumption is engaged[69]. The language of "rights", resorted to in argument by both parties, is a distraction given that what is at stake is fulfilment of a statutory precondition to the existence of a statutory immunity from common law and statutory liability.

69 The stated objects of the *Fair Work Act* are too general to permit of a conclusion that one construction would better achieve those objects than the

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67 (2016) 245 FCR 39.

68 Huddleston and Pullum, *The Cambridge Grammar of the English Language*, (2002) at 145 [5.3.3].

69 See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328-330 [18]-[23]; [2004] HCA 40.

other[70]. Extrinsic material is no help: the explanatory memorandum did no more than parrot the statutory text[71].

70 Legislative history is equivocal. The legislative antecedents of s 413(5)[72] referred to compliance rather than an absence of contravention. Those antecedents were themselves ambiguous. There is no reason for thinking that the difference between then and now is attributable to a hardening of legislative policy as distinct from a change of drafting style.

71 Difficult though it is, the constructional choice can and must be made in the application of workaday interpretative methodology. Nothing simpler or more sophisticated is involved than attempting sympathetically to determine which construction of the contested statutory text better fits the context of the statutory scheme of which that text forms part. Linguistic indications are important. More important is the "purpose and policy" reasonably attributed to the provision within the statutory scheme[73].

72 The statutory scheme is that relevantly foreshadowed in the reference in the stated objects of the *Fair Work Act* to the Act's "emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action"[74]. That scheme is comprised principally within two interlocking sets of provisions. The first is Pt 2-4, which in Div 8 implements the specific object of enabling the Fair Work Commission ("the FWC") "to facilitate good faith bargaining"[75]. The second is Pt 3-3, which in Div 2 sets out "when industrial action for a proposed enterprise agreement is

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70 See *Carr v Western Australia* (2007) 232 CLR 138 at 142-143 [5]-[6]; [2007] HCA 47.

71 Australia, House of Representatives, Fair Work Bill 2008, Explanatory Memorandum at 263 [1664].

72 *Industrial Relations Act* 1988 (Cth) (as at 31 March 1994), s 170PI(1)(b) and (2)(b); *Workplace Relations Act* 1996 (Cth) (as at 20 January 1997), s 170MP(1)(b), (2)(b) and (3)(c); *Workplace Relations Act* 1996 (Cth) (as at 27 March 2006), ss 443 and 444(c).

73 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28, quoting *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397; [1955] HCA 27.

74 Section 3(f).

75 Section 171(b).

protected industrial action"[76], with the consequence that "[n]o action lies under any law in force in a State or Territory in relation to [it] except in certain circumstances"[77], and in Div 4 enables the FWC "to make orders, in certain circumstances, that industrial action stop, not occur or not be organised for a specified period"[78]. Before turning to consider the different constructions of s 413(5) for which the parties contended, it is necessary to describe the most salient aspects of the statutory scheme of which it is a part in some detail.

73 Part 2.4 is concerned "to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits"[79]. Collective bargaining for an enterprise agreement is a statutory process commenced by formal notification[80] and conducted between "bargaining representatives" who are ordinarily an employer (such as Esso) and an employee organisation (such as the AWU)[81].

74 Within Pt 2.4, Div 8 is concerned to provide for the FWC to facilitate collective bargaining, including by making "bargaining orders" and by making "serious breach declarations"[82].

75 Division 8 of Pt 2-4 enumerates the "good faith bargaining requirements" which a bargaining representative for a proposed enterprise agreement "must meet"[83]. The good faith bargaining requirements include certain high level substantive requirements ("giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals", "refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining" and "recognising and bargaining with the other bargaining

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76 Section 406.

77 Section 406, referring to the effect of s 415.

78 Section 406.

79 Section 171(a).

80 Section 173.

81 Section 176.

82 Section 169.

83 Section 228.

representatives for the agreement"[84]). They also include some specific procedural requirements ("attending, and participating in, meetings at reasonable times", "disclosing relevant information ... in a timely manner" and "responding to proposals made by other bargaining representatives for the agreement in a timely manner"[85]).

76 The good faith bargaining requirements are not self-executing. There is no immediate sanction for their breach. Instead, a bargaining representative who has a concern that another bargaining representative has not met or is not meeting the good faith bargaining requirements, and who (after giving notice and an opportunity to respond) considers that the other bargaining representative has not adequately responded to the concern, has the option of applying to the FWC for a bargaining order in relation to the proposed enterprise agreement[86].

77 On such an application being made, the FWC has discretion to make a bargaining order if satisfied that certain preconditions are met[87]. Amongst the preconditions of which the FWC must be satisfied to enliven that discretion is that either "one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements"[88] or "the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement"[89].

78 If the FWC decides to make a bargaining order, the bargaining order which it makes must relevantly specify "the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements"[90]. The bargaining order must also specify, if and to the extent applicable, "such matters, actions or requirements as the FWC considers appropriate ... for the

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84 Section 228(1)(d)-(f).

85 Section 228(1)(a)-(c).

86 Section 229.

87 Section 230(1).

88 Section 230(3)(a)(i).

89 Section 230(3)(a)(ii).

90 Section 231(1)(a).

purpose of promoting the efficient or fair conduct of bargaining for the agreement"[91].

79 A bargaining order made by the FWC has three relevant statutory characteristics. First, it is capable of being varied or revoked by the FWC either on the FWC's own initiative or on application by any person who is affected by it[92]. There is no reason to consider that the power of variation or revocation cannot be exercised to vary or revoke the bargaining order retrospectively to the date of its making[93]. Second, it has a strict temporal operation, coming into operation on the day it is made[94] and ceasing to be in operation at the earliest of a number of specified events, one of which is "if the order is revoked – the time specified in the instrument of revocation"[95] and others of which are "when a workplace determination that covers the employees that would have been covered by the agreement comes into operation"[96] and "when the bargaining representatives for the agreement agree that bargaining has ceased"[97]. Third, it is binding: a person to whom a bargaining order applies "must not contravene" the order[98] and such a contravention is capable of resulting, on application, in a court issuing an injunction or imposing a pecuniary penalty[99]. The issuing of an injunction or imposition of a pecuniary penalty is in each case discretionary.

80 The statutory scheme places no restriction on the number or the detail of the bargaining orders which the FWC might make during bargaining for an enterprise agreement. The circumstances considered by the Full Court of the Federal Court in *Australian Mines and Metals Association Inc v Maritime Union*

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91 Section 231(1)(d).

92 Section 603.

93 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte North Melbourne Electric Tramways and Lighting Co Ltd* (1920) 29 CLR 106 at 110; [1920] HCA 82.

94 Section 232(a).

95 Section 232(b)(i).

96 Section 232(b)(iii).

97 Section 232(b)(iv).

98 Section 233.

99 Sections 539(2) (item 6), 545 and 546 (each located in Pt 4-1).

of Australia[100], decided contemporaneously with the decision now under appeal, illustrate that a single process of collective bargaining for a proposed enterprise agreement can result in cumulative or successive bargaining orders. The same circumstances also illustrate that contravention of a particular bargaining order might be short-lived (such as where a document or event ordered to be provided or to occur at or by a specified time is provided or occurs shortly after that time) and that determining whether or not a contravention has occurred might turn on contestable questions of fact of an evaluative nature (such as whether information disclosed in a document provided in purported compliance with the bargaining order meets the description of information of the quality ordered to be disclosed).

81 It is against the background of the potential for there to be a wide range in the relative significance of the contraventions of bargaining orders which might occur in the course of collective bargaining for a proposed enterprise agreement that Div 8 of Pt 2-4 goes on to empower the FWC, again on the application of a bargaining representative[101], to make a serious breach declaration[102].

82 To make a serious breach declaration, the FWC must be satisfied not only that one or more of the bargaining representatives has contravened one or more bargaining orders in relation to an enterprise agreement but that the contravention or contraventions "are serious and sustained" and "have significantly undermined bargaining for the agreement"[103]. The FWC must, in addition, be satisfied that the other bargaining representatives have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the enterprise agreement; that agreement on those terms will not be reached in the foreseeable future; and that it is reasonable in all the circumstances to make the declaration, taking account of the views of all bargaining representatives[104].

83 Like a bargaining order, a serious breach declaration comes into operation on the day it is made[105]. Unlike a bargaining order, a serious breach declaration cannot be varied or revoked by the FWC[106]. Nor is a serious breach declaration

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100 (2016) 242 FCR 210. See *Australian Mines and Metals Association Inc v Maritime Union of Australia* (2015) 251 IR 75 at 79-81 [8].

101 Section 234.

102 Section 235(1).

103 Section 235(2)(a)-(b).

104 Section 235(2)(c)-(e).

105 Section 235(5)(a).

106 Section 603(3)(b).

an order that is capable of contravention. One consequence of a serious breach declaration is that, if the bargaining representatives do not settle all of the matters during bargaining for the agreement before a specified "post-declaration negotiating period" ends, the FWC must make a "bargaining related workplace determination" which will operate instead of the enterprise agreement[107]. Another consequence of a serious breach declaration is that, by force of s 413(7)(c) the terms of which it is appropriate in due course to note, its operation has an immediate disentitling effect on the taking of protected industrial action for the proposed enterprise agreement.

84 Division 2 of Pt 3-3 defines protected industrial action for a proposed enterprise agreement to encompass industrial action organised or engaged in against an employer by the bargaining representative of an employee if that industrial action meets the description of "employee claim action" or "employee response action"[108]. Protected industrial action for the proposed enterprise agreement can in that way include, for example, a refusal by employees to attend for work or a restriction by employees on the performance of work[109]. Division 2 also defines protected industrial action for a proposed enterprise agreement to encompass industrial action taken by an employer that meets the description of "employer response action"[110]. Protected industrial action for the proposed enterprise agreement can in that way also include a lockout of employees from their employment by their employer[111].

85 The separate descriptions of employee claim action, employee response action and employer response action, set out in subdiv A of Div 2, each contain a common element. The common element is that the industrial action "meets the common requirements set out in" subdiv B of Div 2[112]. It is within that subdivision that s 413 is located.

86 Before turning to examine s 413's prescription of the common requirements to be met for industrial action for a proposed enterprise agreement to answer the description of employee claim action, employee response action or

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107 Division 4 of Pt 2-5.

108 Sections 408(a)-(b), 409(1) and 410(1).

109 Section 19(1)(b)-(c).

110 Sections 408(c) and 411.

111 Section 19(1)(d).

112 Sections 409(1)(c), 410(1)(c) and 411(c).

employer response action, and on that basis to have the status of protected industrial action, it is convenient to note the provisions of Divs 4 and 6 of Pt 3-3.

87 Division 4 of Pt 3-3 provides for the making by the FWC of orders stopping industrial action which appears to the FWC not to be protected industrial action. Of its own initiative or on the application of a person affected, the FWC must make an order (colloquially known as a "stop order") to the effect that industrial action specified in the order stop, not occur or not be organised for a period specified in the order if it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action is happening or is threatened, impending or probable or is being organised[113].

88 Like a bargaining order, a stop order is capable of being varied or revoked by the FWC either on the FWC's own initiative or on application by any person who is affected by the stop order[114] and, like a bargaining order, there is no reason to consider that a stop order cannot be varied or revoked retrospectively.

89 Also like a bargaining order, a person to whom a stop order applies "must not contravene" the order[115] and such a contravention is capable of resulting, on application, in a court issuing an injunction or imposing a pecuniary penalty[116]. The issuing of an injunction or the imposition of a pecuniary penalty is, again, in each case discretionary. However, a person is not required to comply with a stop order if the industrial action to which the order relates is, or would be, protected industrial action[117]. The result is that, although the FWC is obliged to order that industrial action stop once it appears to the FWC that the industrial action is not protected industrial action, the stop order has no binding effect if the industrial action to which the order relates objectively answers the description of protected industrial action.

90 The circumstances considered by the Full Court of the Federal Court in the decision under appeal illustrate that determining whether a contravention of a stop order has or has not occurred can involve questions of fact concerning whether industrial action that is taken falls within the precise scope of the industrial action specified in the order and that those questions of fact can be of a

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113 Section 418.

114 Section 603.

115 Section 421(1).

116 Sections 421(3), 539(2) (item 15) and 546.

117 Section 421(2).

technical nature. Those circumstances also illustrate that contravention of a particular stop order might be short-lived.

91 Division 6 of Pt 3-3 provides for the making by the FWC of orders suspending or terminating protected industrial action. One of the circumstances in which the FWC has discretion to make such an order of its own initiative or on application is where the FWC is satisfied that the action is causing or is threatening to cause significant economic harm to any employer or employee who will be covered by the proposed agreement[118]. For the purpose of working out whether protected industrial action is causing or threatening to cause such significant economic harm, the FWC is required to take into account a number of factors[119]. Those factors include "the objective of promoting and facilitating bargaining for the agreement"[120]. They also include "whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement"[121]. To the extent that it requires the FWC to take into account whether the bargaining representatives "have not contravened any bargaining orders in relation to the agreement", the legislative expression of the second of those factors replicates rather than resolves the question of construction which arises under s 413(5). Whatever view is taken of "must not have contravened" in s 413(5), it may be that a consistent reading of ss 413(5) and 423(4)(e) confines the inquiry indicated by that factor to an inquiry into the conduct of bargaining representatives other than a bargaining representative taking the protected industrial action suspension or termination of which is under consideration. There are problems enough without attempting now to resolve that peripheral question.

92 Turning then to examine s 413's prescription of the common requirements that must be met for industrial action for a proposed enterprise agreement to answer the description of employee claim action, employee response action or employer response action, it is necessary to begin with the explanation in s 413(1) that the section "sets out the common requirements for industrial action to be protected industrial action for a proposed enterprise agreement". What is immediately apparent from that explanation is that the common requirements are requirements that must be met at the time the industrial action is taken.

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118 Section 423.

119 Section 423(4).

120 Section 423(4)(g).

121 Section 423(4)(e).

93 Maintaining that present temporal standpoint and present temporal focus, s 413(2) states the negative requirement that the industrial action "must not relate to a proposed enterprise agreement that is" in one or other of two specified categories, s 413(3) states the positive requirement that the relevant bargaining representative "must be genuinely trying to reach an agreement", and s 413(6) states the further negative requirement that the person organising or engaging in the industrial action "must not" thereby contravene s 417 (the terms of which have the same present temporal focus).

94 Maintaining the same present temporal standpoint and maintaining the same present temporal focus, s 413(7) relevantly provides:

> "None of the following must be in operation:
>
> (a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;
>
> ...
>
> (c) a serious breach declaration in relation to the agreement."

95 Maintaining the same temporal standpoint, but utilising the passive form of the present perfect tense and obviously looking back to the immediate past, s 413(4) states the further positive requirement that the notice requirements set out in s 414 "must have been met in relation to the industrial action". The notice requirements set out in s 414 are such that those requirements could only "have been met" at the time industrial action is taken if written notice of the proposed industrial action was given at a time "before" the industrial action is taken.

96 Maintaining the same temporal standpoint, but lacking the clarity of temporal focus of each of s 413(2), (3), (4), (6) and (7), is s 413(5), which provides:

> "The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:
>
> (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement – the bargaining representative;
>
> (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement – the employee and the bargaining representative of the employee."

97 Two aspects of the operation of s 413(5) are uncontroversial. One is that its reference to orders "that apply to" the bargaining representative, "and that

relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement", encompasses bargaining orders and stop orders. The other is that its operation is objective and self-executing. To the extent it attaches consequences to contravention of a bargaining order or a stop order, those consequences apply irrespective of the gravity of the contravention and independently of a court imposing a pecuniary penalty or issuing an injunction.

98 The requirement that the bargaining representative organising or engaging in the industrial action (and the employee or employees in a case to which s 413(5)(b) applies) "must not have contravened any orders that apply to them" would have a capricious operation were it read as referring only to the absence of a past breach of an existing order. There could be no reason to deny protection to industrial action organised or engaged in by a bargaining representative who has in the past breached an existing order and yet extend protection to industrial action organised or engaged in by a bargaining representative who has in the past breached a past order.

99 Neither of the constructions advanced in the appeal encounters that difficulty. On the construction advanced by the AWU – that "must not have contravened" refers to the absence of a present state of contravention (equivalent to "is not contravening") – the use of the present tense to describe the orders to which the sub-section refers reinforces the totality of its temporal focus on the time at which the industrial action is taken. On the construction advanced by Esso – that "must not have contravened" refers to the absence of a past event of contravention (equivalent to "did not contravene") – the use of the present tense to identify the orders to which the sub-section refers is of no temporal significance. The reference is concerned merely to identify the characteristics of the order at the time of contravention.

100 The construction advanced by Esso avoids that difficulty, however, by sacrificing linguistic consistency. Within a section otherwise conspicuous in using the present tense to refer to the present, the present tense is stripped of temporal significance. And within the one sub-section, determinative temporal significance is attributed to some words and none to others.

101 More important than mere linguistic consistency is consistency of the consequences produced by each of the alternative constructions with the other elements of the statutory scheme.

102 On the construction advanced by the AWU – that "must not have contravened" refers to the absence of a present state of contravention – the common requirement set out in s 413(5) is relevantly that the bargaining representative organising or engaging in the industrial action must not be in contravention of an existing order at the time of taking the industrial action. The bargaining representative is prevented by the common requirement from taking

advantage of an immunity provided by one aspect of the statutory scheme while at the same time being in contravention of an existing obligation imposed under another aspect of the same statutory scheme. The bargaining representative is prevented from approbating and reprobating.

103 On the construction advanced by Esso – that "must not have contravened" refers to the absence of a past event of contravention – the common requirement is relevantly that the bargaining representative organising or engaging in the industrial action must not have been in contravention of any order made at any time in the bargaining process for the enterprise agreement. The common requirement is a harsh and rigid form of industrial discipline which creates an incentive for self-auditing and for strict compliance with any order of the FWC made in or in relation to the bargaining process. Once having in any way contravened any bargaining order or any stop order at any time in the process, the bargaining representative is attainted. The bargaining representative, be it an employee organisation or an employer, thereby becomes an industrial cripple and an industrial outlaw – prevented from backing its negotiating stance with protected industrial action and prevented from organising or engaging in any protected industrial action for the enterprise agreement whether that action is employee claim action, employee response action or employer response action.

104 My difficulty is in seeing such a sweeping denial to an employee organisation or an employer of the capacity to take protected industrial action as consonant with a statutory scheme which is concerned to create an environment for collective bargaining that is fair and flexible and efficient. There is a lack of proportionality between contravention of a bargaining order or a stop order and its consequences. There is also rigidity. Both are at odds with those aspects of the statutory scheme which make constraining or punitive consequences of contravention dependent on the discretionary making of an order by a court, on an application being made and on a contravention being found. Both are also at odds with other aspects of the statutory scheme making separate and elaborate provision for serious and sustained breaches of bargaining orders to result in the making by the FWC of a serious breach declaration the absence of which is a separate and distinct common requirement.

105 No doubt, the arbitrariness of the resultant attainder might be alleviated to some extent by the capacity of an employee organisation or an employer who was in the past in contravention of a bargaining order or a stop order to approach the FWC seeking a retrospective revocation or variation of the order which would have the effect of expunging the contravention. To need to rely on that mechanism to clear the way to the taking of protected industrial action would introduce delays and inefficiencies into the collective bargaining process. The FWC's general power of revocation or variation is ill-suited to the task of conferring on the FWC what would in substance be a power to decide whether proposed industrial action will be protected or unprotected. The FWC would be asked to rake over the coals of the past and to exercise discretion for no reason

other than to allow the employee organisation or employer to take protected industrial action in the future. The considerations appropriate to be taken into account by the FWC in exercising that discretion are unstated in the legislation and are by no means obvious. Further, an employee organisation or an employer who might dispute having been in contravention of a bargaining order or a stop order but who did not want to take the risk of proposed industrial action being unprotected would be placed in the awkward, if not invidious, position of needing either to seek from the FWC a retrospective revocation or variation of the order which it denies is necessary or to seek from a court a declaration that it had not been in contravention of the order.

106 For those reasons, I consider the construction advanced by the AWU to be better. In the words of Buchanan J in the Full Court in the decision under appeal, the focus of s 413(5) is on "whether there is, at the relevant point of time, an existing or current order with which it is not complying, rather than whether at some time in the past it has failed to comply with an order"[122].

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122 (2016) 245 FCR 39 at 81 [162].